ranked according to their subscribers. They are then weighted according to the number of subscribers that they reach relative to the most widely distributed network, The Discovery Channel, which received a weight of 1. Lesser distributed networks receive weights that are equivalent to the fraction of subscribers they have relative to the most widely distributed network.

2. The hypothetical analog tier consists of the channels with the highest subscribers, whose weights sum to 54.9. This hypothetical analog tier consists of 67 program networks. These 67 networks reach the same number of subscribers as that which would be reached if 55 networks each reached 100% of cable subscribers. Construction of the hypothetical digital tier is complicated by the fact that 12 of the 194 most widely distributed networks do not currently receive any license fees. We therefore proceed on two fronts. We construct a digital tier which includes these "no-fee" networks which we refer to as the "inclusive digital tier" as well as an "exclusive digital tier" which excludes networks with no license fees from the hypothetical digital tier. An additional complication is that our information on affiliation fees and distribution of cable networks is not sufficiently broad to get a sufficient number of networks whose weights sum to 33.7, the number of channels on the average digital tier. Therefore both the inclusive and exclusive digital tiers will contain all of the networks not included in our hypothetical analog tier. The inclusive digital tier consists of 127 networks with a total weight of 17. The exclusive digital tier contains 115 networks with a weight of 15.1.

3. We examine two approaches to calculating the marginal implicit fees of the hypothetical analog and digital tiers. The first approach, which we refer to as the net revenue approach, follows the method used to calculate the operator-specific rates. The average mark-up of cable operators is determined. This value is used to determine net revenue of each network on the tier by multiplying it against the affiliation fee to obtain gross revenue and subtracting off the programming cost to obtain net revenue. The marginal implicit fee is calculated as the mean or median net revenue of the least profitable 15% of channels on the tier. The other approach, which we call the per-subscriber fee approach, calculates the marginal implicit fee as the mean or median affiliation fee of the least costly 15% of channels on the hypothetical tier. Because the mark-up of each channel on a tier is the same, ranking networks by net revenue or per-subscriber fees leads to the same ordering of the networks. Therefore, the identities of the channels used to calculate the marginal implicit fee under either approach are the same for a given hypothetical tier.

A. The Marginal Implicit Fee under the Net Revenue Approach

4. As discussed, the net revenue approach mirrors the system-specific method adopted in this order. The mark-up of programming costs by cable operators is determined by dividing video revenues by programming costs.[3] The mark-up in the cable industry is 2.76. This mark-up is then applied to the per-subscriber affiliation fees of the networks in the hypothetical tiers in order to determine the gross revenue per subscriber that each of those networks generates for the cable industry. Subtracting the per subscriber affiliation fee from the gross revenue per subscriber yields the net revenue per subscriber. The next step in the calculation is to determine the marginal channels, which is based upon the number of channels that the average cable operator must set aside for leased access. The marginal networks for the maximum allowable rate on an analog tier will be the 15% of 54.9 or 8.2 networks. The marginal channels are those channels, with the lowest net revenues amongst the 67, whose weights sum to 8.2 (the number of marginal channels on our hypothetical analog tier). The weighted mean of the net revenue of those 13 networks is equal to $0.091 per subscriber per month and the weighted median is equal to $0.094

[3] We base this calculation on the average of the programming cost as a percentage of revenue for three large cable operators in 2005. The inverse of this number is equal to the mark-up. SNL Kagan, *Cable TV Investor: Deals and Finance*, January 31, 2007 at 6.

per subscriber per month.

5. Calculation of the maximum rate for the hypothetical digital tiers is similar. The tier consists of those networks that were not included in the hypothetical analog tier with the greatest numbers of subscribers, whose weights sum to 33.7.[4] The marginal channels are those channels, with the lowest net revenues whose weights sum to 5.1 (15% of the number of channels on our hypothetical digital tier). The weighted mean net revenue of those networks is \$0.056 per subscriber per month and the weighted median is \$0.070 per subscriber per month for the exclusive digital tier. The weighted mean net revenue for the inclusive digital tier is \$0.026 per subscriber per month and the weighted median is \$0.035 per subscriber per month.

B. The Marginal Implicit Fee under the Per-Subscriber Fee Approach

6. The per-subscriber fee method is based upon the costs incurred by a cable system when it must vacate a channel in order to provide capacity to a commercial leased access programmer. If a cable system that receives a request for LA carriage has no vacant channels available, then the system will need to incur certain costs in order to make the required capacity available to the LA programmer. Specifically, it is unlikely that the commercial contracts that the cable operator has with program channels permit unilateral costless cancellation by the cable operator. Even without detailed information on these contracts, it is reasonable to assume that the cable operator would need to provide some compensation to the "bumped" channel in order to induce it to vacate the system. One reasonable candidate for this is the fee that the cable operator was collecting from each consumer and paying to the bumped channel (the "per-subscriber fee"). If we assume that the marginal channel is earning negligible advertising revenues, then that channel would be made whole if it continued to receive the per-subscriber fee that the cable operator had been paying. We use this as an alternative method of examining the costs that leased access programming may impose on cable operators.

7. To calculate the marginal implicit fee under the per-subscriber fee approach, rather than calculating the weighted means and medians of the net revenue of the bottom 15% of networks in a tier, the weighted means and medians of the affiliation fees are calculated. As discussed, because a constant mark-up is applied to affiliation fees when calculating net revenue, networks with the lowest net revenue are also the networks with the lowest affiliation fees. Therefore the marginal implicit cost using the per-subscriber fee method is based on exactly the same networks as used to calculate the marginal implicit fee with the net revenue method. The weighted mean of the per-subscriber fee of the marginal networks on the hypothetical analog tier is equal to \$0.051 per subscriber per month and the weighted median is equal to \$0.053 per subscriber per month. The weighted mean of the per-subscriber fee of the marginal networks on the hypothetical inclusive digital tier is equal to \$0.015 per subscriber per month and the weighted median is equal to \$0.020 per subscriber per month. The weighted mean of the programming cost of the marginal networks on the hypothetical exclusive digital tier is equal to \$0.032 per subscriber per month and the weighted median is equal to \$0.040 per subscriber per month.

[4] Our information on per subscriber affiliation fees and distribution of cable networks is not sufficiently broad to get a sufficient number of networks whose weights sum to 33.7. This occurs because there is a substantial population of networks with very limited distribution. However, in our existing data, we noted that there are a number of networks with license fees that are effectively zero. It is likely that the lesser networks that we have been unable to include have a similar paucity of license revenues. Failure to include these additional networks makes the marginal implicit fee for digital tiers slightly higher than it otherwise would be.

APPENDIX E

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA"),[1] an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the *Notice of Proposed Rulemaking* ("*Notice*") in MB Docket No. 07-42.[2] The Commission sought written public comment on the proposals in the *Notice of Proposed Rulemaking*, including comment on the IRFA. This present Final Regulatory Flexibility Analysis ("FRFA") conforms to the RFA.[3]

A. Need for, and Objectives of, the Rules Adopted

2. The commercial leased access requirements set forth in Section 612 of the Communications Act of 1934 require a cable operator to set aside channel capacity for commercial use by video programmers unaffiliated with the cable operator.[4] The purposes of Section 612 are "to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems."[5]

3. In the *Order*, the Commission concludes that its rules governing commercial leased access have impeded the use of leased access channels by programmers, including smaller entities, thereby undermining the goals of Section 612. The *Order* adopts several rules to address this concern. Regarding commercial leased access rates, the Commission concludes that its current formula for calculating leased access rates yields fees charged by cable operators that are higher than the statute mandates, resulting in an underutilization of leased access channels.[6] To address this concern, the *Order* modifies the Commission's formula used to calculate commercial leased access rates, which will result in making these channels a more viable outlet for leased access programming.[7] The *Order* also provides that the maximum leased access rate will not exceed $0.10 per subscriber per month for any cable system.[8] Cable operators may petition the Commission to exceed the maximum allowable leased access rates.[9] A petition for relief must present specific facts justifying the system's specific leased access rate and provide an alternative rate which equitably balances the revenue requirements of the cable operator with the public

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[1] *See* 5 U.S.C. § 603. The RFA has been amended by the *Contract With America Advancement Act of 1996*, Pub. L. No. 104-121, 110 Stat. 847 (1996) ("CWAAA"). *See* 5 U.S.C. § 601 et. seq. Title II of the CWAAA is the *Small Business Regulatory Enforcement Fairness Act of 1996* ("SBREFA").

[2] *See Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage,* Notice of Proposed Rule Making, MB Docket No. 07-42, FCC 07-18 (rel. June 15, 2007) (the "*NPRM*").

[3] *See* 5 U.S.C. § 604.

[4] *See* 47 U.S.C. § 532.

[5] *See* 47 U.S.C. § 532(a).

[6] *See Order* at ¶¶ 35-42.

[7] *See id.* at ¶¶ 43-46.

[8] *See id.* at ¶ 47-49.

[9] *See id.* at ¶ 49.

interest goals of the leased access statute.[10] The *Order* does not apply the new rate methodology or the maximum allowable leased access rate of $0.10 per subscriber to programmers that predominantly transmit sales presentations or program length commercials.[11]

4. To address poor customer service practices of cable system operators with regard to potential leased access programmers, the *Order* requires a cable system operator to meet uniform customer service standards; to maintain a contact name, telephone number, and e-mail address on its website; to make available by telephone a designated person to respond to requests for information about leased access channels; and to maintain a brief explanation of the leased access statute and regulations on its website.[12] In response to concerns raised by commercial leased access programmers that contract terms and conditions imposed by cable operators are often unfair, unreasonable, onerous, and overly burdensome, the *Order* requires cable operators to apply the same uniform standards, terms, and conditions for all of its leased access programmers as it applies to its other programmers.[13] The *Order* also specifies the information that a leased access programmer must provide to a cable system operator in order to be considered for carriage, and requires the cable system operator to respond to the proposal by accepting the proposed terms or offering alternative terms within 10 days.[14]

5. Regarding leased access complaint procedures, the *Order* adopts an expedited process which requires the Media Bureau to resolve leased access complaints within 90 days of the close of the pleading cycle and eliminates the requirement for a leased access complainant alleging that a rate is unreasonable to first obtain a determination of the cable operator's maximum permitted rate from an independent accountant.[15] The *Order* revises rules to provide that, as part of the remedy phase of a leased access complaint process, the Media Bureau will have the discretion to request that the parties file their best and final offer for the prices, terms, or conditions in dispute, and the Media Bureau will have the discretion to adopt one of the best and final offers or to choose to fashion its own remedy.[16] The *Order* also amends the Commission's discovery rules pertaining to leased access complaints by requiring respondents to attach to their answers copies of any documents that they rely on in their defense; finding that in the context of a complaint proceeding, it would be unreasonable for a respondent not to produce all the documents either requested by the complainant or ordered by the Commission, provided that such documents are in its control and relevant to the dispute, subject to the protection of confidential material; and emphasizing that the Commission will use its authority to issue default orders granting a complaint if a respondent fails to comply with its discovery requests.[17]

6. Moreover, in order to ensure that the Commission has sufficient up-to-date information on the status of leased access programming in the future, the *Order* adopts a reporting requirement for cable operators that requires cable operators to file annual reports on leased access rates, channel usage, and

[10] *See id.*

[11] *See id.* at ¶ 37.

[12] *See id.* at ¶¶ 12-13.

[13] *See id.* at ¶¶ 27-31.

[14] *See id.* at ¶¶ 12, 14-32.

[15] *See id.* at ¶¶ 51-56.

[16] *See id.* at n.156.

[17] *See id.* at ¶¶ 57-65.

complaints, among other matters pertaining to leased access.[18] Leased access programmers will have an opportunity to file comments with the Commission in response to these reports.[19]

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

7. There were no comments filed specifically in response to the IRFA.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

8. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[20] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[21] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[22] A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA").[23]

9. *Wired Telecommunications Carriers.* The 2007 North American Industry Classification System ("NAICS") defines "Wired Telecommunications Carriers" (2007 NAISC code 517110) to include the following three classifications which were listed separately in the 2002 NAICS: Wired Telecommunications Carriers (2002 NAICS code 517110), Cable and Other Program Distribution (2002 NAICS code 517510), and Internet Service Providers (2002 NAISC code 518111).[24] The 2007 NAISC defines this category as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that

[18] *See id.* at ¶¶ 66-70.

[19] *See id.* at ¶ 70.

[20] 5 U.S.C. § 603(b)(3).

[21] 5 U.S.C. § 601(6).

[22] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[23] 15 U.S.C. § 632.

[24] *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/ n07-n02.xls).

they operate are included in this industry."[25] The SBA has developed a small business size standard for Wired Telecommunications Carriers, which is all firms having 1,500 employees or less.[26] According to Census Bureau data for 2002, there were a total of 27,148 firms in the Wired Telecommunications Carriers category (2002 NAISC code 517110) that operated for the entire year; 6,021 firms in the Cable and Other Program Distribution category (2002 NAISC code 517510) that operated for the entire year; and 3,408 firms in the Internet Service Providers category (2002 NAISC code 518111) that operated for the entire year.[27] Of these totals, 25,374 of 27,148 firms in the Wired Telecommunications Carriers category (2002 NAISC code 517110) had less than 100 employees; 5,496 of 6,021 firms in the Cable and Other Program Distribution category (2002 NAISC code 517510) had less than 100 employees; and 3,303 of the 3,408 firms in the Internet Service Providers category (2002 NAISC code 518111) had less than 100 employees.[28] Thus, under this size standard, the majority of firms can be considered small.

10. *Cable and Other Program Distribution.* The 2002 NAICS defines this category as follows: "This industry comprises establishments primarily engaged as third-party distribution systems for broadcast programming. The establishments of this industry deliver visual, aural, or textual programming received from cable networks, local television stations, or radio networks to consumers via cable or direct-to-home satellite systems on a subscription or fee basis. These establishments do not generally originate programming material."[29] This category includes, among others, cable operators, direct broadcast satellite ("DBS") services, home satellite dish ("HSD") services, satellite master antenna television ("SMATV") systems, and open video systems ("OVS"). The SBA has developed a small business size standard for Cable and Other Program Distribution, which is all such firms having $13.5 million or less in annual receipts.[30] According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.[31] Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million.[32] Thus, under this size standard, the majority of firms can be considered small.

11. *Cable System Operators (Rate Regulation Standard).* The Commission has also developed its own small business size standards for the purpose of cable rate regulation. Under the Commission's

[25] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers"; http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.

[26] 13 C.F.R. § 121.201 (2002 NAICS code 517110).

[27] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 2, Employment Size of Establishments for the United States: 2002 (2002 NAISC code 517110; 2002 NAISC code 517510; 2002 NAISC code 518111) (issued November 2005).

[28] *Id.*

[29] U.S. Census Bureau, 2002 NAICS Definitions, "517510 Cable and Other Program Distribution"; http://www.census.gov/epcd/naics02/def/NDEF517.HTM. As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC code 517510). *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/n07-n02.xls).

[30] 13 C.F.R. § 121.201 (2002 NAICS code 517510).

[31] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002 (NAICS code 517510) (issued November 2005).

[32] *Id.* An additional 61 firms had annual receipts of $25 million or more.

rules, a "small cable company" is one serving 400,000 or fewer subscribers nationwide.[33] As of 2006, 7,916 cable operators qualify as small cable companies under this standard.[34] In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.[35] Industry data indicate that 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000-19,999 subscribers.[36] Thus, under this standard, most cable systems are small.

12. *Cable System Operators (Telecom Act Standard).* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[37] There are approximately 65.4 million cable subscribers in the United States today.[38] Accordingly, an operator serving fewer than 654,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[39] Based on available data, we find that the number of cable operators serving 654,000 subscribers or less totals approximately 7,916.[40] We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million.[41] Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

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[33] 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of $100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation,* Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

[34] 74 TELEVISION AND CABLE FACTBOOK F-2 (Warren Comm. News eds., 2006); Top 25 MSOs – NCTA.com, *available at* http://www.ncta.com/ContentView.aspx?contentId=73 (last visited September 6, 2007). We arrived at 7,916 cable operators qualifying as small cable companies by subtracting the ten cable companies with over 400,000 subscribers found on the NCTA website from the 7,926 total number of cable operators found in the Television and Cable Factbook.

[35] 47 C.F.R. § 76.901(c).

[36] Warren Communications News, *Television & Cable Factbook 2006*, "U.S. Cable Systems by Subscriber Size," page F-2 (data current as of Oct. 2005). The data do not include 718 systems for which classifying data were not available.

[37] 47 U.S.C. § 543(m)(2); *see* 47 C.F.R. § 76.901(f) & nn. 1-3.

[38] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Twelfth Annual Report*, 21 FCC Rcd 2503, 2507, ¶ 10 and 2617, Table B-1 (2006) ("*12th Annual Report*").

[39] 47 C.F.R. § 76.901(f); *see* Public Notice, *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, DA 01-158 (Cable Services Bureau, Jan. 24, 2001).

[40] 74 TELEVISION AND CABLE FACTBOOK F-2 (Warren Commc'ns News eds., 2006); Top 25 MSOs – NCTA.com, *available at* http://www.ncta.com/ContentView.aspx?contentId=73 (last visited September 6, 2007). We arrived at 7,916 cable operators qualifying as small cable companies by subtracting the ten cable companies with over 654,000 subscribers found on the NCTA website from the 7,926 total number of cable operators found in the Television and Cable Factbook.

[41] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. *See* 47 C.F.R. § 76.909(b).

13. *Direct Broadcast Satellite ("DBS") Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic "dish" antenna at the subscriber's location. Because DBS provides subscription services, DBS falls within the SBA-recognized definition of Cable and Other Program Distribution.[42] This definition provides that a small entity is one with $13.5 million or less in annual receipts.[43] Currently, three operators provide DBS service, which requires a great investment of capital for operation: DIRECTV, EchoStar (marketed as the DISH Network), and Dominion Video Satellite, Inc. ("Dominion") (marketed as Sky Angel).[44] All three currently offer subscription services. Two of these three DBS operators, DIRECTV[45] and EchoStar Communications Corporation ("EchoStar"),[46] report annual revenues that are in excess of the threshold for a small business. The third DBS operator, Dominion's Sky Angel service, serves fewer than one million subscribers and provides 20 family and religion-oriented channels.[47] Dominion does not report its annual revenues. The Commission does not know of any source which provides this information and, thus, we have no way of confirming whether Dominion qualifies as a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS licensee. Nevertheless, given the absence of specific data on this point, we recognize the possibility that there are entrants in this field that may not yet have generated $13.5 million in annual receipts, and therefore may be categorized as a small business, if independently owned and operated.

14. *Private Cable Operators (PCOs) also known as Satellite Master Antenna Television (SMATV) Systems.* PCOs, also known as SMATV systems or private communication operators, are video distribution facilities that use closed transmission paths without using any public right-of-way. PCOs acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. The SBA definition of small entities for Cable and Other Program Distribution Services includes PCOs and, thus, small entities are defined as all such companies generating $13.5 million or less in annual receipts.[48] Currently, there are approximately 150 members in the Independent Multi-Family Communications Council (IMCC), the trade association that represents PCOs.[49] Individual PCOs often

[42] 13 C.F.R. § 121.201 (2002 NAICS code 517510). As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC code 517510). *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/n07-n02.xls).

[43] 13 C.F.R. § 121.201 (2002 NAICS code 517510).

[44] *See 12th Annual Report*, 21 FCC Rcd at 2538-39, ¶ 70 and 2620, Table B-3.

[45] DIRECTV is the largest DBS operator and the second largest MVPD, serving an estimated 15.72 million subscribers nationwide as of June 2005. *See 12th Annual Report*, 21 FCC Rcd at 2620, Table B-3.

[46] EchoStar, which provides service under the brand name Dish Network, is the second largest DBS operator and one of the four largest MVPDs, serving an estimated 12.27 million subscribers nationwide. *Id.*

[47] *See id.* at 2540, ¶ 73 .

[48] 13 C.F.R. § 121.201 (2002 NAICS code 517510). As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC code 517510). *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/n07-n02.xls).

[49] *See 12th Annual Report*, 21 FCC Rcd at 2564-65, ¶ 130. Previously, the Commission reported that IMCC had 250 members; *see Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Tenth Annual Report*, 19 FCC Rcd 1606, 1666, ¶ 90 (2004) ("*10th Annual Report*").

serve approximately 3,000-4,000 subscribers, but the larger operations serve as many as 15,000-55,000 subscribers. In total, PCOs currently serve approximately one million subscribers.[50] Because these operators are not rate regulated, they are not required to file financial data with the Commission. Furthermore, we are not aware of any privately published financial information regarding these operators. Based on the estimated number of operators and the estimated number of units served by the largest ten PCOs, we believe that a substantial number of PCO may qualify as small entities.

15. *Home Satellite Dish ("HSD") Service.* Because HSD provides subscription services, HSD falls within the SBA-recognized definition of Cable and Other Program Distribution, which includes all such companies generating $13.5 million or less in revenue annually.[51] HSD or the large dish segment of the satellite industry is the original satellite-to-home service offered to consumers, and involves the home reception of signals transmitted by satellites operating generally in the C-band frequency. Unlike DBS, which uses small dishes, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from program packagers that are licensed to facilitate subscribers' receipt of video programming. There are approximately 30 satellites operating in the C-band, which carry over 500 channels of programming combined; approximately 350 channels are available free of charge and 150 are scrambled and require a subscription. HSD is difficult to quantify in terms of annual revenue. HSD owners have access to program channels placed on C-band satellites by programmers for receipt and distribution by MVPDs. Commission data shows that, between June 2004 and June 2005, HSD subscribership fell from 335,766 subscribers to 206,358 subscribers, a decline of more than 38 percent.[52] The Commission has no information regarding the annual revenue of the four C-Band distributors.

16. *Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service comprises Multichannel Multipoint Distribution Service (MMDS) systems and Multipoint Distribution Service (MDS).[53] MMDS systems, often referred to as "wireless cable," transmit video programming to subscribers using the microwave frequencies of MDS and Educational Broadband Service (EBS) (formerly known as Instructional Television Fixed Service (ITFS)).[54] We estimate that the number of wireless cable subscribers is approximately 100,000, as of March 2005. The SBA definition of small entities for Cable and Other Program Distribution, which includes such companies generating $13.5 million in annual receipts, appears applicable to MDS and ITFS.[55]

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[50] *See 12th Annual Report*, 21 FCC Rcd at 2564-65, ¶ 130.

[51] 13 C.F.R. § 121.201 (NAICS code 517510). As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC code 517510). *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/n07-n02.xls).

[52] *See 12th Annual Report*, 21 FCC Rcd at 2617, Table B-1. HSD subscribership declined more than 33 percent between June 2003 and June 2004. *See id.*

[53] *Amendment of Parts 1, 21 73, 74, and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, WT Docket No. 03-66, RM-10586, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 14165 (2004).

[54] *See id.*

[55] As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC code 517510). *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/n07-n02.xls).

17. The Commission has also defined small MDS (now BRS) entities in the context of Commission license auctions. For purposes of the 1996 MDS auction, the Commission defined a small business as an entity that had annual average gross revenues of less than $40 million in the previous three calendar years.[56] This definition of a small entity in the context of MDS auctions has been approved by the SBA.[57] In the MDS auction, 67 bidders won 493 licenses.[58] Of the 67 auction winners, 61 claimed status as a small business. At this time, the Commission estimates that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than $40 million and are thus considered small entities.[59] MDS licensees and wireless cable operators that did not receive their licenses as a result of the MDS auction fall under the SBA small business size standard for Cable and Other Program Distribution, which includes all such entities that do not generate revenue in excess of $13.5 million annually.[60] Information available to us indicates that there are approximately 850 of these licensees and operators that do not generate revenue in excess of $13.5 million annually. Therefore, we estimate that there are approximately 850 small entity MDS (or BRS) providers, as defined by the SBA and the Commission's auction rules.

18. Educational institutions are included in this analysis as small entities; however, the Commission has not created a specific small business size standard for ITFS (now EBS).[61] We estimate that there are currently 2,032 ITFS (or EBS) licensees, and all but 100 of the licenses are held by educational institutions. Thus, we estimate that at least 1,932 ITFS licensees are small entities.

19. *Local Multipoint Distribution Service.* Local Multipoint Distribution Service (LMDS) is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.[62] The SBA definition of small entities for Cable and Other Program Distribution, which includes such companies generating $13.5 million in annual receipts, appears applicable to LMDS.[63] The Commission has also defined small LMDS entities in the context of Commission license

[56] 47 C.F.R. § 21.961(b)(1) (2002).

[57] *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, Report and Order*, 10 FCC Rcd 9589 (1995).

[58] MDS Auction No. 6 began on November 13, 1995, and closed on March 28, 1996 (67 bidders won 493 licenses).

[59] Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934. 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standards for "other telecommunications" (annual receipts of $13.5 million or less). *See* 13 C.F.R. § 121.201 (2007 NAICS code 517910).

[60] 13 C.F.R. § 121.201 (NAICS code 517510). As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC code 517510). *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/n07-n02.xls).

[61] In addition, the term "small entity" under SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on ITFS licensees.

[62] *See Local Multipoint Distribution Service*, Second Report and Order, 12 FCC Rcd 12545 (1997).

[63] As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC code 517510). *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/n07-n02.xls).

auctions. In the 1998 and 1999 LMDS auctions,[64] the Commission defined a small business as an entity that had annual average gross revenues of less than $40 million in the previous three calendar years.[65] Moreover, the Commission added an additional classification for a "very small business," which was defined as an entity that had annual average gross revenues of less than $15 million in the previous three calendar years.[66] These definitions of "small business" and "very small business" in the context of the LMDS auctions have been approved by the SBA.[67] In the first LMDS auction, 104 bidders won 864 licenses. Of the 104 auction winners, 93 claimed status as small or very small businesses. In the LMDS re-auction, 40 bidders won 161 licenses. Based on this information, we believe that the number of small LMDS licenses will include the 93 winning bidders in the first auction and the 40 winning bidders in the re-auction, for a total of 133 small entity LMDS providers as defined by the SBA and the Commission's auction rules.

20. *Open Video Systems ("OVS").* The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,[68] OVS falls within the SBA-recognized definition of Cable and Other Program Distribution Services, which provides that a small entity is one with $ 13.5 million or less in annual receipts.[69] The Commission has approved approximately 120 OVS certifications with some OVS operators now providing service.[70] Broadband service providers (BSPs) are currently the only significant holders of OVS certifications or local OVS franchises, even though OVS is one of four statutorily-recognized options for local exchange carriers (LECs) to offer video programming services. As of June 2005, BSPs served approximately 1.4 million subscribers, representing 1.49 percent of all MVPD households.[71] Among BSPs, however, those operating under the OVS framework are in the minority.[72] As of June 2005, RCN Corporation is the largest BSP and 14th largest MVPD, serving approximately 371,000 subscribers.[73] RCN received approval to operate OVS systems in New York City, Boston,

[64] The Commission has held two LMDS auctions: Auction No. 17 and Auction No. 23. Auction No. 17, the first LMDS auction, began on February 18, 1998, and closed on March 25, 1998 (104 bidders won 864 licenses). Auction No. 23, the LMDS re-auction, began on April 27, 1999, and closed on May 12, 1999 (40 bidders won 161 licenses).

[65] *See LMDS Order,* 12 FCC Rcd at 12545.

[66] *Id.*

[67] *See* Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, FCC from A. Alvarez, Administrator, SBA (January 6, 1998).

[68] *See* 47 U.S.C. § 573.

[69] 13 C.F.R. § 121.201 (NAICS code 517510). As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC code 517510). *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/n07-n02.xls).

[70] *See* Current Filings for Certification of Open Video Systems, http://www.fcc.gov/mb/ovs/csovscer.html (last visited July 25, 2007); Current Filings for Certification of Open Video Systems, http://www.fcc.gov/mb/ovs/csovsarc.html (last visited July 25, 2007).

[71] *See 12th Annual Report*, 21 FCC Rcd at 2617, Table B-1.

[72] OPASTCO reports that less than 8 percent of its members provide service under OVS certification. *See id.* at 2548-49, ¶ 88 n.336.

[73] *See id.* at 2549, ¶ 89. WideOpenWest is the second largest BSP and 16th largest MVPD, with cable systems serving about 292,500 subscribers as of June 2005. *See id.* The third largest BSP is Knology, which was serving approximately 179,800 subscribers as of June 2005. *See id.*

Washington, D.C. and other areas. The Commission does not have financial information regarding the entities authorized to provide OVS, some of which may not yet be operational. We thus believe that at least some of the OVS operators may qualify as small entities.

21. *Cable and Other Subscription Programming.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis . . . . These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers."[74] The SBA has developed a small business size standard for firms within this category, which is all firms with $13.5 million or less in annual receipts.[75] According to Census Bureau data for 2002, there were 270 firms in this category that operated for the entire year.[76] Of this total, 217 firms had annual receipts of under $10 million and 13 firms had annual receipts of $10 million to $24,999,999.[77] Thus, under this category and associated small business size standard, the majority of firms can be considered small.

22. *Motion Picture and Video Production.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in producing, or producing and distributing motion pictures, videos, television programs, or television commercials."[78] The SBA has developed a small business size standard for firms within this category, which is all firms with $27 million or less in annual receipts.[79] According to Census Bureau data for 2002, there were 7,772 firms in this category that operated for the entire year.[80] Of this total, 7,685 firms had annual receipts of under $24,999,999 and 45 firms had annual receipts of between $25,000,000 and $49,999,999.[81] Thus, under this category and associated small business size standard, the majority of firms can be considered small. Each of these NAICS categories is very broad and includes firms that may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms exclusively produce and/or distribute programming for cable television or how many are independently owned and operated.

23. *Motion Picture and Video Distribution.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in acquiring distribution rights and distributing film and video productions to motion picture theaters, television networks and stations, and

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[74] U.S. Census Bureau, 2007 NAICS Definitions, "515210 Cable and Other Subscription Programming"; http://www.census.gov/naics/2007/def/ND515210.HTM#N515210.

[75] 13 C.F.R. § 121.201 (NAICS code 515210).

[76] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Establishment and Firm Size (Including Legal Form of Organization): 2002, Table 4 (NAICS code 515210) (issued November 2005).

[77] *Id.* An additional 40 firms had annual receipts of $25 million or more.

[78] *See* U.S. Census Bureau, 2007 NAICS Definitions, "51211 Motion Picture and Video Production"; http://www.census.gov/naics/2007/def/NDEF512.HTM#N51211.

[79] 13 C.F.R. § 121.201 (NAICS code 51211).

[80] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Establishment and Firm Size (Including Legal Form of Organization): 2002, Table 4 (NAICS code 51211) (issued November 2005).

[81] *Id.*

exhibitors."[82] The SBA has developed a small business size standard for firms within this category, which is all firms with $27 million or less in annual receipts.[83] According to Census Bureau data for 2002, there were 377 firms in this category that operated for the entire year.[84] Of this total, 365 firms had annual receipts of under $24,999,999 and 7 firms had annual receipts of between $25,000,000 and $49,999,999.[85] Thus, under this category and associated small business size standard, the majority of firms can be considered small. Each of these NAICS categories is very broad and includes firms that may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms exclusively produce and/or distribute programming for cable television or how many are independently owned and operated.

24. *Small Incumbent Local Exchange Carriers.* We have included small incumbent local exchange carriers in this present RFA analysis. A "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[86] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not "national" in scope.[87] We have therefore included small incumbent local exchange carriers in this RFA, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

25. *Incumbent Local Exchange Carriers ("LECs").* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[88] According to Commission data,[89] 1,307 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,307 carriers, an estimated 1,019 have 1,500 or fewer employees and 288 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses.

26. *Competitive Local Exchange Carriers, Competitive Access Providers (CAPs), Shared-Tenant Service Providers," and "Other Local Service Providers."* Neither the Commission nor the SBA has

[82] *See* U.S. Census Bureau, 2007 NAICS Definitions, "51212 Motion Picture and Video Distribution"; http://www.census.gov/naics/2007/def/NDEF512.HTM#N51212.

[83] 13 C.F.R. § 121.201 (NAICS code 51212).

[84] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Establishment and Firm Size (Including Legal Form of Organization): 2002, Table 4 (NAICS code 51212) (issued November 2005).

[85] *Id.*

[86] 15 U.S.C. § 632.

[87] Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small-business concern," which the RFA incorporates into its own definition of "small business." *See* 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. *See* 13 C.F.R. § 121.102(b).

[88] 13 C.F.R. § 121.201 (2007 NAICS code 517110).

[89] FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3, page 5-5 (February 2007) ("Trends in Telephone Service"). This source uses data that are current as of October 20, 2005.

developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[90] According to Commission data,[91] 859 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 859 carriers, an estimated 741 have 1,500 or fewer employees and 118 have more than 1,500 employees. In addition, 16 carriers have reported that they are "Shared-Tenant Service Providers," and all 16 are estimated to have 1,500 or fewer employees. In addition, 44 carriers have reported that they are "Other Local Service Providers." Of the 44, an estimated 43 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, "Shared-Tenant Service Providers," and "Other Local Service Providers" are small entities.

27. *Electric Power Generation, Transmission and Distribution.* The Census Bureau defines this category as follows: "This industry group comprises establishments primarily engaged in generating, transmitting, and/or distributing electric power. Establishments in this industry group may perform one or more of the following activities: (1) operate generation facilities that produce electric energy; (2) operate transmission systems that convey the electricity from the generation facility to the distribution system; and (3) operate distribution systems that convey electric power received from the generation facility or the transmission system to the final consumer."[92] The SBA has developed a small business size standard for firms in this category: "A firm is small if, including its affiliates, it is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and its total electric output for the preceding fiscal year did not exceed 4 million megawatt hours."[93] According to Census Bureau data for 2002, there were 1,644 firms in this category that operated for the entire year.[94] Census data do not track electric output and we have not determined how many of these firms fit the SBA size standard for small, with no more than 4 million megawatt hours of electric output. Consequently, we estimate that 1,644 or fewer firms may be considered small under the SBA small business size standard.

D. Description of Reporting, Recordkeeping and other Compliance Requirements

28. The rules adopted in the *Report and Order* will impose additional reporting, recordkeeping, and other compliance requirements on cable system operators and leased access programmers. The *Order* requires a respondent in a leased access complaint proceeding that expressly relies upon a document in asserting a defense to include the document as part of its answer.[95] The *Order* finds that in the context of a leased access complaint proceeding, it would be unreasonable for a respondent not to produce all the documents either requested by the complainant or ordered by the Commission, provided that such documents are in its control and relevant to the dispute.[96] The *Order* requires the parties to a leased

[90] 13 C.F.R. § 121.201 (2007 NAICS code 517110).

[91] *See* Trends in Telephone Service at Table 5.3.

[92] U.S. Census Bureau, 2007 NAICS Definitions, "2211 Electric Power Generation, Transmission and Distribution"; http://www.census.gov/naics/2007/def/NDEF221.HTM#N2211.

[93] 13 C.F.R. § 121.201 (2007 NAICS codes 221111, 221112, 221113, 221119, 221121, 221122, footnote 1).

[94] U S. Census Bureau, 2002 Economic Census, Subject Series: Utilities, Establishment and Firm Size (Including Legal Form of Organization): 2002, Table 4 (2007 NAICS codes 221111, 221112, 221113, 221119, 221121, 221122) (issued November 2005).

[95] *See Order* at ¶ 57.

[96] *See id.* at ¶ 57.

access complaint proceeding to enter into a Protective Order to protect pleading or discovery material that is deemed by the submitting party to contain confidential information.[97] The *Order* requires cable system operators to submit annual reports on leased access rates, channel usage, and complaints.[98] The *Order* requires cable system operators to provide prospective leased access programmers with certain information within three business days of the date on which a request for leased access information is made.[99] A longer period for small systems to respond has been retained. The *Order* requires cable system operators to meet uniform customer service standards with respect to their dealings with leased access programmers and to apply uniform contract terms and conditions to all leased access programmers as applied to other programmers.[100] The *Order* requires cable systems to maintain a contact name, telephone number, and e-mail address on their website and to make available by telephone a designated person to respond to requests for information about leased access channels.[101] The *Order* requires a cable system operator to maintain a brief explanation of the leased access statute and regulations on its website.[102] The *Order* specifies the information that a leased access programmer must provide to a cable system operator in order to be considered for carriage and requires the cable system operator to respond to the proposal by accepting the proposed terms or offering alternative terms within 10 days.[103]

E. Steps Taken to Minimize Significant Impact on Small Entities and Significant Alternatives Considered

29. The RFA requires an agency to describe any significant alternatives that it has considered in proposing regulatory approaches, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[104] The *Notice* invited comment on issues that had the potential to have significant economic impact on some small entities.[105]

30. As discussed in Section A, the decision to modify the leased access rules will facilitate the goals of Section 612 of the Communications Act "to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems."[106] The decision confers benefits upon the variety of leased access programmers, most of which are smaller entities. Thus, the decision to modify the leased access rules benefits smaller entities as

[97] *See id.* at ¶¶ 62-65.

[98] *See id.* at ¶¶ 66-70.

[99] *See id.* at ¶¶ 14-32.

[100] *See id.* at ¶¶ 26-31.

[101] *See id.* at ¶ 13.

[102] *See id.* at ¶ 12.

[103] *See id.* at ¶¶ 33-34.

[104] 5 U.S.C. § 603(c).

[105] *See NPRM*, 22 FCC Rcd 11222, ¶ 27 and Appendix A.

[106] *See* 47 U.S.C. § 532(a).

well as larger entities. The alternative of retaining the current leased access rules would hinder achieving the goals of competition and diversity as envisioned by Congress. Moreover, the alternative of requiring only certain cable operators to comply with these new rules, such as only large cable operators, would similarly impede achieving the goals of competition and diversity as envisioned by Congress. However, a longer period for small systems to respond to certain requests for information has been retained.

F. Report to Congress

31. The Commission will send a copy of the *Report and Order*, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act.[107] In addition, the Commission will send a copy of the *Report and Order*, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *Report and Order* and FRFA (or summaries thereof) will also be published in the Federal Register.[108]

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[107] *See* 5 U.S.C. § 801(a)(1)(A).

[108] *See* 5 U.S.C. § 604(b).

APPENDIX F

Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (the "RFA")[1] the Commission has prepared this Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact on small entities by the policies and rules proposed in the *Further Notice of Proposed Rulemaking* ("*FNPRM*").[2] Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided on the first page of the document. The Commission will send a copy of the *FNPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA").[3] In addition, the *FNPRM* and IRFA (or summaries thereof) will be published in the *Federal Register*.[4]

A. Need for, and Objectives of, the Proposed Rules

2. *Overview.* The commercial leased access requirements set forth in Section 612 of the Communications Act of 1934 require a cable operator to set aside channel capacity for commercial use by video programmers unaffiliated with the cable operator.[5] The purposes of Section 612 are "to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems."[6]

3. In the *Report and Order* in MB Docket No. 07-42, the Commission modified its formula used to calculate commercial leased access rates, which will result in making leased access channels a more viable outlet for leased access programming. The *Order* also provides that the maximum leased access rate will not exceed $0.10 per subscriber per month for any cable system. The *Order*, however, did not apply the modified rate formula or the maximum allowable leased access rate to programmers that predominantly transmit sales presentations or program length commercials. These direct sales programmers often "pay" for carriage -- either directly or through some form of revenue sharing with the cable operator.[7]

4. In the *FNPRM*, the Commission notes its concern about setting the leased access rates at a point at which programmers that predominantly transmit sales presentations or program length commercials simply migrate to leased access because it is less expensive than their current commercial arrangements.[8] Accordingly, the *FNPRM* considers whether leased access at current rates is affordable to programmers that predominantly transmit sales presentations and program length commercials.[9] The

[1] The RFA, *see* 5 U.S.C. §§ 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2] *See* 5 U.S.C. § 603.

[3] *See* 5 U.S.C. § 603(a).

[4] *See id.*

[5] *See* 47 U.S.C. § 532.

[6] *See* 47 U.S.C. § 532(a).

[7] *See FNPRM* at ¶ 74.

[8] *See id.* at ¶ 75.

[9] *See id.*

FNPRM considers whether applying the modified leased access rate formula to programmers that predominantly transmit sales presentations or program length commercials will cause migration of these services to leased access.[10] If these services do migrate to leased access, the *FNPRM* considers the effect of such a migration.[11] The *FNPRM* also considers whether a separate category for direct sales programmers is appropriate.[12]

5. In the *FNPRM*, the Commission seeks comment on the foregoing issues. In particular, the *FNPRM* invites comment on issues that may impact small entities, including cable operators and leased access programmers.

B. Legal Basis

6. The authority for the action proposed in the rulemaking is contained in Section 4(i), 303, and 612 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303, and 532.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

32. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[13] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[14] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[15] A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA").[16]

33. *Wired Telecommunications Carriers.* The 2007 North American Industry Classification System ("NAICS") defines "Wired Telecommunications Carriers" (2007 NAISC code 517110) to include the following three classifications which were listed separately in the 2002 NAICS: Wired Telecommunications Carriers (2002 NAICS code 517110), Cable and Other Program Distribution (2002 NAISC code 517510), and Internet Service Providers (2002 NAISC code 518111).[17] The 2007 NAISC defines this category as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the

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[10] *See id.*

[11] *See id.*

[12] *See id.*

[13] 5 U.S.C. § 603(b)(3).

[14] 5 U.S.C. § 601(6).

[15] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[16] 15 U.S.C. § 632.

[17] *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/ n07-n02.xls).

transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry."[18] The SBA has developed a small business size standard for Wired Telecommunications Carriers, which is all firms having 1,500 employees or less.[19] According to Census Bureau data for 2002, there were a total of 27,148 firms in the Wired Telecommunications Carriers category (2002 NAISC code 517110) that operated for the entire year; 6,021 firms in the Cable and Other Program Distribution category (2002 NAISC code 517510) that operated for the entire year; and 3,408 firms in the Internet Service Providers category (2002 NAISC code 518111) that operated for the entire year.[20] Of these totals, 25,374 of 27,148 firms in the Wired Telecommunications Carriers category (2002 NAISC code 517110) had less than 100 employees; 5,496 of 6,021 firms in the Cable and Other Program Distribution category (2002 NAISC code 517510) had less than 100 employees; and 3,303 of the 3,408 firms in the Internet Service Providers category (2002 NAISC code 518111) had less than 100 employees.[21] Thus, under this size standard, the majority of firms can be considered small.

34. *Cable and Other Program Distribution.* The 2002 NAICS defines this category as follows: "This industry comprises establishments primarily engaged as third-party distribution systems for broadcast programming. The establishments of this industry deliver visual, aural, or textual programming received from cable networks, local television stations, or radio networks to consumers via cable or direct-to-home satellite systems on a subscription or fee basis. These establishments do not generally originate programming material."[22] This category includes, among others, cable operators, direct broadcast satellite ("DBS") services, home satellite dish ("HSD") services, satellite master antenna television ("SMATV") systems, and open video systems ("OVS"). The SBA has developed a small business size standard for Cable and Other Program Distribution, which is all such firms having $13.5 million or less in annual receipts.[23] According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.[24] Of this total, 1,087 firms had annual receipts of

[18] U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers"; http://www.census.gov/naics/2007/def/ND517110.HTM#N517110.

[19] 13 C.F.R. § 121.201 (2002 NAICS code 517110).

[20] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 2, Employment Size of Establishments for the United States: 2002 (2002 NAISC code 517110; 2002 NAISC code 517510; 2002 NAISC code 518111) (issued November 2005).

[21] *Id.*

[22] U.S. Census Bureau, 2002 NAICS Definitions, "517510 Cable and Other Program Distribution"; http://www.census.gov/epcd/naics02/def/NDEF517.HTM. As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC code 517510). *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/n07-n02.xls).

[23] 13 C.F.R. § 121.201 (2002 NAICS code 517510).

[24] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002 (NAICS code 517510) (issued November 2005).

under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million.[25] Thus, under this size standard, the majority of firms can be considered small.

35. *Cable System Operators (Rate Regulation Standard).* The Commission has also developed its own small business size standards for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers nationwide.[26] As of 2006, 7,916 cable operators qualify as small cable companies under this standard.[27] In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.[28] Industry data indicate that 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000-19,999 subscribers.[29] Thus, under this standard, most cable systems are small.

36. *Cable System Operators (Telecom Act Standard).* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[30] There are approximately 65.4 million cable subscribers in the United States today.[31] Accordingly, an operator serving fewer than 654,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[32] Based on available data, we find that the number of cable operators serving 654,000 subscribers or less totals approximately 7,916.[33] We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities

[25] *Id.* An additional 61 firms had annual receipts of $25 million or more.

[26] 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of $100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation,* Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

[27] 74 TELEVISION AND CABLE FACTBOOK F-2 (Warren Comm. News eds., 2006); Top 25 MSOs – NCTA.com, *available at* http://www.ncta.com/ContentView.aspx?contentId=73 (last visited September 6, 2007). We arrived at 7,916 cable operators qualifying as small cable companies by subtracting the ten cable companies with over 400,000 subscribers found on the NCTA website from the 7,926 total number of cable operators found in the Television and Cable Factbook.

[28] 47 C.F.R. § 76.901(c).

[29] Warren Communications News, *Television & Cable Factbook 2006*, "U.S. Cable Systems by Subscriber Size," page F-2 (data current as of Oct. 2005). The data do not include 718 systems for which classifying data were not available.

[30] 47 U.S.C. § 543(m)(2); *see* 47 C.F.R. § 76.901(f) & nn. 1-3.

[31] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Twelfth Annual Report*, 21 FCC Rcd 2503, 2507, ¶ 10 and 2617, Table B-1 (2006) ("*12th Annual Report*").

[32] 47 C.F.R. § 76.901(f); *see* Public Notice, *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, DA 01-158 (Cable Services Bureau, Jan. 24, 2001).

[33] 74 TELEVISION AND CABLE FACTBOOK F-2 (Warren Commc'ns News eds., 2006); Top 25 MSOs – NCTA.com, *available at* http://www.ncta.com/ContentView.aspx?contentId=73 (last visited September 6, 2007). We arrived at 7,916 cable operators qualifying as small cable companies by subtracting the ten cable companies with over 654,000 subscribers found on the NCTA website from the 7,926 total number of cable operators found in the Television and Cable Factbook.

whose gross annual revenues exceed $250 million.[34] Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

37. *Direct Broadcast Satellite ("DBS") Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic "dish" antenna at the subscriber's location. Because DBS provides subscription services, DBS falls within the SBA-recognized definition of Cable and Other Program Distribution.[35] This definition provides that a small entity is one with $13.5 million or less in annual receipts.[36] Currently, three operators provide DBS service, which requires a great investment of capital for operation: DIRECTV, EchoStar (marketed as the DISH Network), and Dominion Video Satellite, Inc. ("Dominion") (marketed as Sky Angel).[37] All three currently offer subscription services. Two of these three DBS operators, DIRECTV[38] and EchoStar Communications Corporation ("EchoStar"),[39] report annual revenues that are in excess of the threshold for a small business. The third DBS operator, Dominion's Sky Angel service, serves fewer than one million subscribers and provides 20 family and religion-oriented channels.[40] Dominion does not report its annual revenues. The Commission does not know of any source which provides this information and, thus, we have no way of confirming whether Dominion qualifies as a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS licensee. Nevertheless, given the absence of specific data on this point, we recognize the possibility that there are entrants in this field that may not yet have generated $13.5 million in annual receipts, and therefore may be categorized as a small business, if independently owned and operated.

38. *Private Cable Operators (PCOs) also known as Satellite Master Antenna Television (SMATV) Systems.* PCOs, also known as SMATV systems or private communication operators, are video distribution facilities that use closed transmission paths without using any public right-of-way. PCOs acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. The SBA definition of small entities for Cable and Other Program Distribution Services includes PCOs and, thus, small entities are defined as all such companies generating $13.5 million or less

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[34] The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. *See* 47 C.F.R. § 76.909(b).

[35] 13 C.F.R. § 121.201 (2002 NAICS code 517510). As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC code 517510). *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/n07-n02.xls).

[36] 13 C.F.R. § 121.201 (2002 NAICS code 517510).

[37] *See 12th Annual Report*, 21 FCC Rcd at 2538-39, ¶ 70 and 2620, Table B-3.

[38] DIRECTV is the largest DBS operator and the second largest MVPD, serving an estimated 15.72 million subscribers nationwide as of June 2005. *See 12th Annual Report*, 21 FCC Rcd at 2620, Table B-3.

[39] EchoStar, which provides service under the brand name Dish Network, is the second largest DBS operator and one of the four largest MVPDs, serving an estimated 12.27 million subscribers nationwide. *Id.*

[40] *See id.* at 2540, ¶ 73 .

in annual receipts.[41] Currently, there are approximately 150 members in the Independent Multi-Family Communications Council (IMCC), the trade association that represents PCOs.[42] Individual PCOs often serve approximately 3,000-4,000 subscribers, but the larger operations serve as many as 15,000-55,000 subscribers. In total, PCOs currently serve approximately one million subscribers.[43] Because these operators are not rate regulated, they are not required to file financial data with the Commission. Furthermore, we are not aware of any privately published financial information regarding these operators. Based on the estimated number of operators and the estimated number of units served by the largest ten PCOs, we believe that a substantial number of PCO may qualify as small entities.

39. *Home Satellite Dish ("HSD") Service.* Because HSD provides subscription services, HSD falls within the SBA-recognized definition of Cable and Other Program Distribution, which includes all such companies generating $13.5 million or less in revenue annually.[44] HSD or the large dish segment of the satellite industry is the original satellite-to-home service offered to consumers, and involves the home reception of signals transmitted by satellites operating generally in the C-band frequency. Unlike DBS, which uses small dishes, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from program packagers that are licensed to facilitate subscribers' receipt of video programming. There are approximately 30 satellites operating in the C-band, which carry over 500 channels of programming combined; approximately 350 channels are available free of charge and 150 are scrambled and require a subscription. HSD is difficult to quantify in terms of annual revenue. HSD owners have access to program channels placed on C-band satellites by programmers for receipt and distribution by MVPDs. Commission data shows that, between June 2004 and June 2005, HSD subscribership fell from 335,766 subscribers to 206,358 subscribers, a decline of more than 38 percent.[45] The Commission has no information regarding the annual revenue of the four C-Band distributors.

40. *Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service comprises Multichannel Multipoint Distribution Service (MMDS) systems and Multipoint Distribution Service (MDS).[46] MMDS systems, often referred to as "wireless cable," transmit video programming to subscribers using the microwave frequencies of MDS and Educational Broadband Service (EBS)

[41] 13 C.F.R. § 121.201 (2002 NAICS code 517510). As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC code 517510). *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/n07-n02.xls).

[42] *See 12th Annual Report*, 21 FCC Rcd at 2564-65, ¶ 130. Previously, the Commission reported that IMCC had 250 members; *see Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Tenth Annual Report*, 19 FCC Rcd 1606, 1666, ¶ 90 (2004) ("*10th Annual Report*").

[43] *See 12th Annual Report*, 21 FCC Rcd at 2564-65, ¶ 130.

[44] 13 C.F.R. § 121.201 (NAICS code 517510). As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC code 517510). *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/n07-n02.xls).

[45] *See 12th Annual Report*, 21 FCC Rcd at 2617, Table B-1. HSD subscribership declined more than 33 percent between June 2003 and June 2004. *See id.*

[46] *Amendment of Parts 1, 21 73, 74, and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, WT Docket No. 03-66, RM-10586, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 14165 (2004).

(formerly known as Instructional Television Fixed Service (ITFS)).[47] We estimate that the number of wireless cable subscribers is approximately 100,000, as of March 2005. The SBA definition of small entities for Cable and Other Program Distribution, which includes such companies generating $13.5 million in annual receipts, appears applicable to MDS and ITFS.[48]

41. The Commission has also defined small MDS (now BRS) entities in the context of Commission license auctions. For purposes of the 1996 MDS auction, the Commission defined a small business as an entity that had annual average gross revenues of less than $40 million in the previous three calendar years.[49] This definition of a small entity in the context of MDS auctions has been approved by the SBA.[50] In the MDS auction, 67 bidders won 493 licenses.[51] Of the 67 auction winners, 61 claimed status as a small business. At this time, the Commission estimates that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than $40 million and are thus considered small entities.[52] MDS licensees and wireless cable operators that did not receive their licenses as a result of the MDS auction fall under the SBA small business size standard for Cable and Other Program Distribution, which includes all such entities that do not generate revenue in excess of $13.5 million annually.[53] Information available to us indicates that there are approximately 850 of these licensees and operators that do not generate revenue in excess of $13.5 million annually. Therefore, we estimate that there are approximately 850 small entity MDS (or BRS) providers, as defined by the SBA and the Commission's auction rules.

42. Educational institutions are included in this analysis as small entities; however, the Commission has not created a specific small business size standard for ITFS (now EBS).[54] We estimate that there are currently 2,032 ITFS (or EBS) licensees, and all but 100 of the licenses are held by educational institutions. Thus, we estimate that at least 1,932 ITFS licensees are small entities.

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[47] *See id.*

[48] As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC code 517510). *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/n07-n02.xls).

[49] 47 C.F.R. § 21.961(b)(1) (2002).

[50] *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, Report and Order*, 10 FCC Rcd 9589 (1995).

[51] MDS Auction No. 6 began on November 13, 1995, and closed on March 28, 1996 (67 bidders won 493 licenses).

[52] Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934. 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standards for "other telecommunications" (annual receipts of $13.5 million or less). *See* 13 C.F.R. § 121.201 (2007 NAICS code 517910).

[53] 13 C.F.R. § 121.201 (NAICS code 517510). As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC code 517510). *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/n07-n02.xls).

[54] In addition, the term "small entity" under SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on ITFS licensees.

43. *Local Multipoint Distribution Service.* Local Multipoint Distribution Service (LMDS) is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.[55] The SBA definition of small entities for Cable and Other Program Distribution, which includes such companies generating $13.5 million in annual receipts, appears applicable to LMDS.[56] The Commission has also defined small LMDS entities in the context of Commission license auctions. In the 1998 and 1999 LMDS auctions,[57] the Commission defined a small business as an entity that had annual average gross revenues of less than $40 million in the previous three calendar years.[58] Moreover, the Commission added an additional classification for a "very small business," which was defined as an entity that had annual average gross revenues of less than $15 million in the previous three calendar years.[59] These definitions of "small business" and "very small business" in the context of the LMDS auctions have been approved by the SBA.[60] In the first LMDS auction, 104 bidders won 864 licenses. Of the 104 auction winners, 93 claimed status as small or very small businesses. In the LMDS re-auction, 40 bidders won 161 licenses. Based on this information, we believe that the number of small LMDS licenses will include the 93 winning bidders in the first auction and the 40 winning bidders in the re-auction, for a total of 133 small entity LMDS providers as defined by the SBA and the Commission's auction rules.

44. *Open Video Systems ("OVS").* The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,[61] OVS falls within the SBA-recognized definition of Cable and Other Program Distribution Services, which provides that a small entity is one with $ 13.5 million or less in annual receipts.[62] The Commission has approved approximately 120 OVS certifications with some OVS operators now providing service.[63] Broadband service providers (BSPs) are currently the only significant holders of OVS certifications or local OVS franchises, even though OVS is one of four statutorily-recognized options for local exchange carriers (LECs) to offer video programming services. As of June 2005, BSPs served approximately 1.4 million subscribers, representing 1.49 percent of all MVPD

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[55] *See Local Multipoint Distribution Service*, Second Report and Order, 12 FCC Rcd 12545 (1997).

[56] As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC code 517510). *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/n07-n02.xls).

[57] The Commission has held two LMDS auctions: Auction No. 17 and Auction No. 23. Auction No. 17, the first LMDS auction, began on February 18, 1998, and closed on March 25, 1998 (104 bidders won 864 licenses). Auction No. 23, the LMDS re-auction, began on April 27, 1999, and closed on May 12, 1999 (40 bidders won 161 licenses).

[58] *See LMDS Order,* 12 FCC Rcd at 12545.

[59] *Id.*

[60] *See* Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, FCC from A. Alvarez, Administrator, SBA (January 6, 1998).

[61] *See* 47 U.S.C. § 573.

[62] 13 C.F.R. § 121.201 (NAICS code 517510). As discussed above, the 2007 NAICS defines "Wired Telecommunications Carriers" (2007 NAISC code 517110) to include, among others, Cable and Other Program Distribution (2002 NAISC code 517510). *See* "2007 NAICS U.S. Matched to 2002 NAICS U.S." (available at http://www.census.gov/naics/2007/n07-n02.xls).

[63] *See* Current Filings for Certification of Open Video Systems, http://www.fcc.gov/mb/ovs/csovscer.html (last visited July 25, 2007); Current Filings for Certification of Open Video Systems, http://www.fcc.gov/mb/ovs/csovsarc.html (last visited July 25, 2007).

households.[64] Among BSPs, however, those operating under the OVS framework are in the minority.[65] As of June 2005, RCN Corporation is the largest BSP and 14th largest MVPD, serving approximately 371,000 subscribers.[66] RCN received approval to operate OVS systems in New York City, Boston, Washington, D.C. and other areas. The Commission does not have financial information regarding the entities authorized to provide OVS, some of which may not yet be operational. We thus believe that at least some of the OVS operators may qualify as small entities.

45. *Cable and Other Subscription Programming.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis . . . . These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers."[67] The SBA has developed a small business size standard for firms within this category, which is all firms with $13.5 million or less in annual receipts.[68] According to Census Bureau data for 2002, there were 270 firms in this category that operated for the entire year.[69] Of this total, 217 firms had annual receipts of under $10 million and 13 firms had annual receipts of $10 million to $24,999,999.[70] Thus, under this category and associated small business size standard, the majority of firms can be considered small.

46. *Motion Picture and Video Production.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in producing, or producing and distributing motion pictures, videos, television programs, or television commercials."[71] The SBA has developed a small business size standard for firms within this category, which is all firms with $27 million or less in annual receipts.[72] According to Census Bureau data for 2002, there were 7,772 firms in this category that operated for the entire year.[73] Of this total, 7,685 firms had annual receipts of under $24,999,999 and 45 firms had annual receipts of between $25,000,000 and $49,999,999.[74] Thus, under this category and

[64] *See 12th Annual Report*, 21 FCC Rcd at 2617, Table B-1.

[65] OPASTCO reports that less than 8 percent of its members provide service under OVS certification. *See id.* at 2548-49, ¶ 88 n.336.

[66] *See id.* at 2549, ¶ 89. WideOpenWest is the second largest BSP and 16th largest MVPD, with cable systems serving about 292,500 subscribers as of June 2005. *See id.* The third largest BSP is Knology, which was serving approximately 179,800 subscribers as of June 2005. *See id.*

[67] U.S. Census Bureau, 2007 NAICS Definitions, "515210 Cable and Other Subscription Programming"; http://www.census.gov/naics/2007/def/ND515210.HTM#N515210.

[68] 13 C.F.R. § 121.201 (NAICS code 515210).

[69] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Establishment and Firm Size (Including Legal Form of Organization): 2002, Table 4 (NAICS code 515210) (issued November 2005).

[70] *Id.* An additional 40 firms had annual receipts of $25 million or more.

[71] *See* U.S. Census Bureau, 2007 NAICS Definitions, "51211 Motion Picture and Video Production"; http://www.census.gov/naics/2007/def/NDEF512.HTM#N51211.

[72] 13 C.F.R. § 121.201 (NAICS code 51211).

[73] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Establishment and Firm Size (Including Legal Form of Organization): 2002, Table 4 (NAICS code 51211) (issued November 2005).

[74] *Id.*

associated small business size standard, the majority of firms can be considered small. Each of these NAICS categories is very broad and includes firms that may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms exclusively produce and/or distribute programming for cable television or how many are independently owned and operated.

47. *Motion Picture and Video Distribution.* The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in acquiring distribution rights and distributing film and video productions to motion picture theaters, television networks and stations, and exhibitors."[75] The SBA has developed a small business size standard for firms within this category, which is all firms with $27 million or less in annual receipts.[76] According to Census Bureau data for 2002, there were 377 firms in this category that operated for the entire year.[77] Of this total, 365 firms had annual receipts of under $24,999,999 and 7 firms had annual receipts of between $25,000,000 and $49,999,999.[78] Thus, under this category and associated small business size standard, the majority of firms can be considered small. Each of these NAICS categories is very broad and includes firms that may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms exclusively produce and/or distribute programming for cable television or how many are independently owned and operated.

48. *Small Incumbent Local Exchange Carriers.* We have included small incumbent local exchange carriers in this present RFA analysis. A "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[79] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not "national" in scope.[80] We have therefore included small incumbent local exchange carriers in this RFA, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

49. *Incumbent Local Exchange Carriers ("LECs").* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[81] According to

[75] *See* U.S. Census Bureau, 2007 NAICS Definitions, "51212 Motion Picture and Video Distribution"; http://www.census.gov/naics/2007/def/NDEF512.HTM#N51212.

[76] 13 C.F.R. § 121.201 (NAICS code 51212).

[77] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Establishment and Firm Size (Including Legal Form of Organization): 2002, Table 4 (NAICS code 51212) (issued November 2005).

[78] *Id.*

[79] 15 U.S.C. § 632.

[80] Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small-business concern," which the RFA incorporates into its own definition of "small business." *See* 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. *See* 13 C.F.R. § 121.102(b).

[81] 13 C.F.R. § 121.201 (2007 NAICS code 517110).